preamble in order to restrict its scope. He places considerable stress on the words 'that immediate action is required' in the preamble as the basis of his argument that the purpose of the Ordinance was to restore order and that it could only have contemplated acts or crimes of violence committed within a reasonable period immediately after the incidents of May 13, 1969, and was intended to operate only until public order was restored. He submits that by the time Parliament met on February 20, 1971, the Ordinance had in fact spent its purpose and force and that it is significant that it was not re-enacted in a permanent form as an Act by Parliament. He contends that the drug problem was not as acute in 1969 as it has become since and that the Ordinance never in fact contemplated within its ambit such acts as trafficking in drugs.

I regret I can see no merit or force in these contentions advanced on behalf of the applicant. That immediate action was necessary after May 13, 1969, is beyond the pale of doubt, but I would think that the requirement of immediate action referred to in the preamble must necessarily correlate to the provisions of Article 150(2) of the Constitution which empower His Majesty to promulgate Ordinances having the force of law until both Houses of Parliament are sitting if satisfied that immediate action is required. The immediacy of the action cannot, in my view, be correlated to the life-span or rather operational efficacy of any Ordinance so enacted.

The fact that the Ordinance has not been re-enacted as an Act of Parliament is equally irrelevant as the Ordinance must necessarily by the express provisions of the Constitution continue to have effect until such time as either Parliament resolves otherwise unless sooner revoked by His Majesty (Article 150(3)) or it lapses at the expiration of a period of six months from the date on which the Proclamation of Emergency ceases to be in force (Article 150(7)). The Proclamation of Emergency issued by His Majesty on May 15, 1969, is still in force in law and in fact and the Ordinance promulgated as a result thereof is equally extant and functional, not theoretically, as counsel for the applicant puts it, but operatively, and applicable in circumstances warranted by its express provisions. The court is certainly in no position to pronounce the Ordinance moribund or exanimate on mere speculative hypotheses. Its enacted provisions must determine its scope and applicability, and in this regard I will presently have to deal with the question whether the matter of trafficking in drugs comes within its purview.

The contention that no substantial alteration in the ordinary law was intended is equally without substance as the Ordinance is emergency legislation and must be considered and construed in the light of its expressly enacted provisions, and its application and scope cannot be restricted, in the absence of limiting words in the enactment itself, to aggravated forms of prejudicial activity which are only calculated to engender violence as contended on behalf of the applicant."

Then as regards the expression "securing public order" in the preamble to the Ordinance, the learned judge examined several authorities on the meaning of public security and at pages 87 and 88 stated his conclusion as follows, with which we respectfully agree:

"Applying the norms and principles enunciated in the selection of cases I have adumbrated (which are by no means exhaustive on the topic under consideration) and with which I wholly agree and would respectfully adopt, it is abundantly clear that trafficking in drugs as a member of an international drug distribution syndicate which is the ground on which the order of detention against the applicant was made strikes at the very core of public order and any person indulging in such activities must necessarily be acting in a manner prejudicial to public order. It is not necessary to elaborate on the deleterious effects of drugs. Trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquillity and society generally.

....

I am accordingly of the view that the ground on which the order of detention was made against the applicant, namely, trafficking in drugs, is within the scope and ambit of the Ordinance and that the contention to the contrary raised on behalf of the applicant is ill-founded, and I would in passing express the hope that my judgment in this matter will have served a purpose, if for nothing else, at least perhaps in providing a sufficient contraceptive against the proliferation of like applications for habeas corpus founded on the identical contention."

In the circumstances we would dismiss this appeal.

Appeals Nos. 16 and 17

As regards appeals Nos. 16 and 17, the facts are given in the judgment reported at [1976] 2 M.L.J. 133. Here too the sole issue before us is the same as in appeal No. 24 and the answer is also the same, and we would therefore dismiss these two appeals also.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.; Kumar, Chan & Chia.*

MINISTER OF HOME AFFAIRS v. CHU CHOON YONG & ANOR.

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) March 15, 1977]

[Kuala Lumpur — Federal Court Criminal Appeals Nos. 20 and 21 of 1975]

Administrative Law — Banishment — Whether detention under banishment order made unlawful because of delay in issuing warrant of execution — Banishment Act, 1959, ss. 3, 5, 6, 7 and 10 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 365 and 375 — Federal Constitution, Articles 5(2) and 162.

Constitutional Law — Fundamental liberty — Detention — Federal Constitution, Arts. 5(2) and 162.

In these two cases the respondents had been arrested and detained under banishment orders. No warrants of execution had been issued, as the Minister could not find a country willing to accept the respondents. It was held in the High Court that the continued detention of the respondents for more than three years in the one case and for more than six years in the other case was unlawful delay which converted their lawful detention to unlawful detention. The appellant appealed to the Federal Court.

Held, allowing the appeal: (1) the learned judge was in error when he found that the continued detention of the respondents was unlawful;

(2) a valid detention order under the Banishment Order remains valid until revoked. The Minister may suspend the order or may instead make an expulsion order so that the banishee may make his own arrangements to leave the country, but the making of those orders is a matter of discretion for the Minister and his refusal to do so does not affect the validity of the orders of detention that are impugned.

Cases referred to:-

(1) *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 M.L.J. 156.

(2) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129.

FEDERAL COURT.

P.M. Mahalingam, Federal Counsel for the appellant.

S. Gamany for the respondent.

Suffian L.P. (read by Wan Suleiman F.J.): These two appeals were heard together.

In the case of Chu Choon Yong @ Choo Siang Meng @ C.C. Yong (Yong), on July 31, 1967, he was detained in Kluang under the Internal Security

Act, 1960. He was kept at the Muar Detention Camp from September 25, 1967, to June 5, 1972. On January 8, 1972, the Minister of Home Affairs made an order under Article 25(1)(a) of the Constitution depriving him of his citizenship with effect from December 21, 1971, on the ground "that he has shown himself by act or speech to be disloyal or disaffected towards the Federation". This order was published in the Government *Gazette* of February 3, 1972, as Notification No. 327.

On May 26, 1972, the Minister of Home Affairs issued an order under section 5 of the Banishment Ordinance, 1959, banishing Yong from Malaysia for the term of his natural life. This order was served on him on June 5, 1972. Since June 6, 1972, he has been detained at Seremban Prison awaiting banishment.

In the case of Soo Yong @ Chan Ming @ Chan Beng (Chan), in 1967 he was detained under the Internal Security Act, 1960, at Batu Gajah and later at Taiping until May 28, 1969.

On January 31, 1969, the Minister of Home Affairs issued an order under section 5 of the Banishment Ordinance, 1959, banishing him from Malaysia for the term of his natural life. This order was served on him on February 7, 1969, at Seremban Prison where he has been detained ever since awaiting banishment.

It was contended on behalf of the respondents in the High Court and before us that, though their detention under the Banishment Act, 1959, was originally lawful, it subsequently became unlawful because it could not be enforced.

The learned trial judge agreed and ordered both respondents to be released.

The Minister of Home Affairs has appealed to us.

The Banishment Act lays down three stages before a person can be banished from the country.

First, the Minister must issue a warrant for the arrest and detention of the person against whom there are reasonable grounds for believing that the banishment of that person is conducive to the good of the Federation: Section 3.

Second, the Minister issues a banishment order: Section 5(3). The person against whom the order is made may apply to the High Court within 14 days for an order to set aside the banishment order on the ground that he is a citizen of the Federation or an exempted person: Section 10.

Third, the Minister issues a warrant of execution: Section 6.

The judge found that the Minister had not issued a warrant of execution under section 6, as he could not find a country willing to accept the respondents.

He found no evidence that the Minister had made any arrangement to transport the respondents out of the country and held that in these days of rapid and frequent transport there was no justifiable reason why a person should wait from three to six years before being banished to another country.

He said that the Minister had other alternatives if he found difficulty in banishing a person, namely he could either suspend the banishment order and order execution of a bond for good behaviour for five years under section 7 or issue an expulsion order under section 8.

The learned judge held that under section 6(1) of the Banishment Act (which provides that a banishment order may be executed at any time after the expiration of 14 days from the date of service of an order under section 5(1)), the Minister must under section 54 of the Interpretation Act, 1967, act with all convenient speed, which he had not done.

For the above reasons, the learned judge held that the continued detention of more than three years in Yong's case and of more than six years in Chan's case under the Banishment Act, 1959, was unlawful delay which converted their lawful detention to unlawful detention.

This started as an application under article 5(2) of the Constitution and it is therefore quite clear that the sole question for the determination of the court is whether or not the respondents were at the time their complaints were heard by the court unlawfully detained and that the court had to be satisfied that the detention was lawful, *i.e.* satisfied by the Minister, and that if the court was not so satisfied then the court should order the release of the respondents.

Article 5(2) reads as follows:

"Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him."

With all due respect to the learned judge and to Mr. Gamany, I think that the learned judge was in error when he found that the continued detention of the respondents was unlawful.

As stated recently by this court at page 158 in *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons, Kuala Lumpur*,[1]

"...when a person complains that he is being illegally or improperly detained, it is for the detaining authority to justify the detention. In the ordinary way, he would produce an order of detention. If the person who signed that order had power to do so and had before, when and after signing that order, complied with all conditions laid down by the law, then the order of detention which is authentic and made in good faith is a sufficient answer, and the court must hold the order and detention lawful — unless the detainee alleges and can prove mala fides."

In the instant case, the detaining authority produced orders of detention the validity of which at the time they were made was and is not disputed. The respondents' only complaint is that the Minister is unable to find a country willing to accept them as banishees and that their continued detention therefore becomes unlawful. I do not agree. A valid detention order under the Banishment Order remains valid until revoked. It is true that the Minister may suspend that order or may instead make an expulsion order so that the banishee may make his own arrangements to leave the country, but in my view the making of these orders is a matter of discretion for the Minister, and his refusal to do so does not affect the validity of the orders of detention that are impugned.

For the above reasons I would allow this appeal.

Before leaving this case, it is worth observing that I agree with Mr. Mahalingam that the learned judge was not quite right when he said that section 375 of the F.M.S. Criminal Procedure Code had been "repealed" by Article 162 of the Constitution and that he would have been more correct if he had said that that section, though unconstitutional as being in conflict with Article 5(2), is not void and should, as required by Article 162(6), be applied by the court to bring it in accord with the Constitution.

Wan Suleiman F.J.: The respondents applied separately, in Miscellaneous Criminal Applications No. 16/75 and No. 17/75, on identical grounds heard jointly by the same judge to have the respective Banishment Orders made against them set aside on the grounds that these orders cannot be enforced so that their detention under the Banishment Act 1959 was unlawful. Their applications were allowed and the Minister of Home Affairs appealed.

Chu Choon Yong @ Choo Siang Meng @ C.C. Yong, 1st respondent (Yong for short) came to Johor with his mother in 1943 at the age of nine years. He was educated at the Yoke Eng High School in Singapore until 1950. In 1951 he worked for the British War Department as a mechanic and was later promoted to storekeeper. In 1958 he became a Citizen of the Federation by registration under Article 17 of the Federal Constitution. In 1958, 1960 and 1963 he contested for the Johor Bahru Town Council elections, was elected and served as a Town Councillor until 1965 when the administration of the Town Council was taken over by the Johor State Government. In 1959 he contested as a candidate in Parliamentary and State elections and was elected a State Assemblyman for the Tanjung Petri constituency. He also contested the 1964 State elections. He is married to a citizen of the Federation and they have three children.

On July 31, 1967 he was detained in Kluang under the Internal Security Act, 1960. He was kept at the Muar Detention Camp from September 25, 1967 to June 5, 1972. On January 8, 1972, the Minister of Home Affairs made an order under Article 25(1)(a) of the Constitution depriving Yong's citizenship on the grounds "that he has shown himself by act or speech to be disloyal or disaffected towards the Federation" with effect from December 21, 1971. This order was published in the Government *Gazette* of February 3, 1972 as Notification No. 327.

On May 26, 1972, the Minister of Home Affairs issued an order under section 5 of the Banishment Ordinance, 1959 banishing Yong from Malaysia for the term of his natural life. This order was served on Yong on June 5, 1972. Since June 6, 1972 Yong has been detained at Seremban Prison awaiting banishment.

Soo Yong @ Chan Ming @ Chan Beng, 2nd respondent (Chan for short) was born in Gelang Patah, Johor on April 14, 1951 and was educated at the Foon Yew Chinese High School Johor Bahru until 1964. Both his parents are citizens of the Federation and so are his brothers and sisters. There is, however, no evidence that Chan himself is a citizen.

In 1967 Chan was detained under the Internal Security Act at Batu Gajah and later at Taiping until May 28, 1969.

On January 31, 1969, the Minister of Home Affairs issued an order under section 5 of the Banishment Ordinance, 1959 banishing Chan from Malaysia for the term of his natural life. This order was served on Chan on February 7, 1969 at Seremban Prison where he has been detained ever since awaiting banishment.

The 2nd ground of appeal which was argued first was that the trial judge had erred when he ruled that section 375 of the Criminal Procedure Code had been repealed by Article 162 of the Constitution.

Section 365 of the Code reads as follows:

"The High Court may whenever it thinks fit direct—

(i) that any person who

(a) ....

(b) is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation,

be set at liberty;".

However, section 375 makes it clear that such direction in the nature of a habeas corpus does not apply when the detention is under the banishment law.

The learned Deputy argues that there has been no repeal of section 375, but that the relevant portion of the Criminal Procedure Code is to be applied with such modification as may be necessary, in accordance with Article 162(6) so that section 375 will be brought "into accord with the provisions of this Constitution" the particular provision in this case being Article 5(2) which reads:

"Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and unless satisfied that the detention is lawful, shall order him to be produced before the court and release him."

The learned trial judge set out in his judgment Article 162(7) which reads:

"In this Article, 'modification' includes amendment, adaptation and repeal."

No modification of an existing law *i.e.* section 375 of Criminal Procedure Code has been made under Article 162(6) so that because of a substantive provision of the Constitution, Article 5(2) — general in its terms, the former section should be applied with modification, which in the present circumstances mean that even where a person is "detained in public custody" under the Banishment Act, 1959, he can still apply to the High Court under the procedure set out in Chapter XXXVI of the Criminal Procedure Code. The net result therefore would be to treat section 375 as if it is non-existent, in short as if it had been repealed.

In paragraph 17 of the affidavit (at page 4 of appeal record) accompanying his notice of motion, the 1st respondent said that it is his belief that the Minister of Home Affairs is unable to execute the Banishment Order since there is no country to which he can be banished. The 2nd respondent made the same assertion in his affidavit. The learned deputy

concedes that the Minister has not issued a warrant of execution, and added that he too understood that no country can be found which was willing to receive the two respondents.

Neither respondent (unlike what was alleged in the case of *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri Malaysia*[2]) had even suggested that the Minister had acted *mala fides* or improperly in delaying the execution of the Banishment Order. The sole reason for the delay, it has been agreed by both sides, is the inability to find a recipient country to date. Mr. Mahalingam coined the term "constructive *mala fide*" to describe this unhappy state of affairs.

I fail to see any purpose in describing it as such for the issue before this court is not one whether any onus lay on the respondents to show that their detention is a power exercised *mala fide* or improperly. Instead, the question, as the learned judge correctly apprehended it, is whether the initial detention which is without doubt lawful, still remained lawful because change in circumstances in potential recipient countries have compelled the continued detention of the respondents.

1st respondent who was a citizen by registration under Article 17 was deprived of his citizenship. There was no evidence to indicate if 2nd respondent is a Malaysian citizen. It is incumbent for the Minister to be satisfied that the deprivation of citizenship as a prelude to banishment does not have the consequences which Article 26B(2) sought to prevent *i.e.* as a result of such deprivation, such person would not be a citizen of any country or in common parlance a stateless person.

It would appear that the Minister was satisfied on May 26, 1972 when he deprived 1st respondent of his citizenship under Article 25(1)(a) that he would not become a stateless person. Though there is no conclusive evidence that he has become such a person, it can safely be assumed that he has achieved that doubtful distinction because no other country, we are told, is willing to receive him.

It has never been suggested that the Minister had not satisfied himself of the consequence of his action as required by Article 25(1)(a) so that the present turn of events cannot support any allegation that he had acted in breach of a Constitutional provision.

The line of reasoning which has led to the present appeal is contained in the passage of his Lordship's judgment which runs thus:

"Upon a reasonable construction of the Act as a whole, the legislature in its wisdom has provided for alternative courses of action in dealing with undesirable aliens but indefinite incarceration of such aliens is certainly not one of them. It is true that section 6(1) provides that 'a banishment order may be carried to execution at any time after the expiration of fourteen days from the date of service' of an order under section 5(1) but 'any time' does not mean an indeterminate time. Section 54 of the Interpretation Act 1967 reads:

'(2) Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.'

I am satisfied that in this case the executive has not acted with all convenient speed."

With respect, the expression "any time" must I think be given its ordinary meaning. A condition precedent which must be fulfilled before a warrant of execution may be issued is to find the country of which he is a citizen or one willing to receive the banishee. (See section 6(3) of the Banishment Ordinance). Only when such country has been found would failure to issue the warrant with all convenient speed enable a charge of *mala fides* to be raised.

There is much in Mr. Gamany's criticism that the Banishment Act, 1959, which has its origin in colonial times, is an anachronism. The time is now long past when banishment to their country of origin of the immigrant population of this country presents no difficulty. Citizenship became a status of extreme importance and the voluntary acquisition of Malaysian citizenship almost invariably resulted in the loss or deprivation of citizenship in the country of origin. (See for example Article 9 of the Indian Constitution). Immigration laws around the world are becoming more and more rigid. Even friendly nations like the United Kingdom have tightened immigration laws restricting the right of abode to "patrials" so that non-patrial Commonwealth citizens and aliens are subject to severe immigration restrictions under the Immigration Act, 1971. (See *Halsbury's* Laws of England 4th Edn. Vol. 4 Pg. 470).

One possible act of amelioration would be for the Minister to grant a suspending order under section 7(1) of the Act which would enable the appellants to be released on bond subject to conditions as to residence etc. for a period not exceeding 5 years. An expulsion order under section 8 would not in the present circumstances serve any useful purpose.

The Banishment Act in its present state provides no machinery to cope with the present impasse, and the time may have arrived for those in a position to do so to take a long look at the Act to see what should be done to bring it into accord with present-day reality.

However, the law being what it is, I would allow this appeal.

Raja Azlan Shah F.J. concurred.

Appeal allowed.

Solicitors: *Daim & Gamany.*